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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

WILLIAM BANTON MOORE ..... PETITIONER

vs. No. 72-1546

COMMONWEALTH OF KENTUCKY ..... RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

ED W. HANCOCK
ATTORNEY GENERAL

G. EDWARD JAMES
ASSISTANT ATTORNEY GENERAL
Capitol Building
Frankfort, Kentucky 40601

COUNSEL FOR RESPONDENT

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OPINION BELOW

The opinion below from the Kentucky Court of Appeals is styled *William Banton Moore* v. *Commonwealth of Kentucky,* reported at 489 S.W.2d 516 (1972).

JURISDICTION

Petitioner's application to invoke the jurisdiction of this Court should be denied because it fails to meet the

jurisdictional requirements of 28 U.S.C. § 1257(3), the proper provision for review of a state court judgment in a criminal case on certiorari.

The question the petitioner attempts to present here under the Fourteenth Amendment of the Constitution of the United States has never been properly presented to or decided by the courts of Kentucky so as to give this Court jurisdiction to review the judgment on writ of certiorari.

In *Columbia Water Power Co.* v. *Columbia Electric R.L.& P. Co.*, 172 U.S. 475, 43 L.ed 521, 19 S.Ct. 247 (1898), this Court in discussing jurisdictional requirements stated:

> "There is no doubt that under the third class the Federal right, title, privilege, or immunity *must be*, with possibly some rare exceptions, *specifically set up or claimed* to give this court jurisdiction." (Emphasis added.)

Rule 23-1(f) of the rules of this Court provides in part:

> *"If review of the judgment of a state court is sought*, the statement of the case shall also specify *the stage in the proceedings in the court of first instance and in the appellate court*, at which, and *the manner in which*, the federal questions sought to be reviewed were raised; *the method of raising them* (e. g., by a pleading, by request to charge and exceptions, by assignment of error); *and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record*, or sum-

mary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portions of the court's charge and exception thereto, assignment of errors) *as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.*" (Emphasis added.)

A review of the record of the state court proceedings in the instant case shows that petitioner did not specifically set up or raise a federal question with the required particularity so as to bring such question to the attention of the state courts. In *Oxley Stave Co.* v. *Butler County*, 166 U.S. 648, 655, 41 L.ed 1149, 17 S.Ct. 1003 (1896), this Court said:

> ". . . the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

In raising the federal question, it is necessary that the question be presented in the state courts in such a manner that there is no doubt that reliance is upon federal rights rather than state rights. See *New York Central & Hudson River Railroad Co.* v. *New York*, 186 U.S. 269, 273, 46 L.ed 1158, 22 S.Ct. 916 (1901).

The fact that petitioner cited a United States Supreme Court case in his briefs to the state court is neither sufficient to raise a federal question nor sufficient to es-

tablish jurisdiction. Jurisdiction cannot be founded by surmise. *Lynch* v. *New York ex rel Pierson*, 293 U.S. 52, 54, 79 L.ed 191, 55 S.Ct. 16 (1934). This application for writ of certiorari should be denied, because petitioner failed to set out or raise a federal question with sufficient definiteness so as to bring such question to the attention of the state courts.

Even if petitioner could be said to have raised a federal question by intendment, it would be of no consequence in the present case. The decision of the state court was based upon a nonfederal ground, i.e., on state law; and this Court, in *Murdock* v. *Memphis*, 20 Wall 590, 22 L.ed 429 (1875), stated that it would not review a state court judgment if there is an adequate and independent state ground which supports the decision of the state courts.

As this Court stated in *Durley* v. *Mayo*, 351 U.S. 277, 100 L.ed 1178, 76 S.Ct. 806:

> "It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the state having jurisdiction and that its decision of the federal question was necessary to its determination of the cause . . . And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the court will not undertake to review it."

The Kentucky Court of Appeals concluded, upon substantial state grounds, that the arguments of the Com-

monwealth Attorney were within the permissible limits allowed by state law.

Notwithstanding that petitioner had properly raised in the state courts the question he presents here, the Court should decline to review because the judgment of this case was reached upon a nonfederal ground which independently and adequately supports the decision reached by the state court. Thus, determination of the question that petitioner brings here was unncesssary by the state court in its decision of this case.

For the foregoing reasons, respondent submits that petitioner's application for certiorari should be denied because it fails to meet jurisdictional requirements.

QUESTION PRESENTED

WHETHER THE COURT OF APPEALS OF KENTUCKY CORRECTLY DECIDED, BASED ON KENTUCKY LAW, THAT THE CLOSING ARGUMENTS OF THE COMMONWEALTH'S ATTORNEY WERE NEITHER ERRONEOUS NOR PREJUDICIAL.

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct. Additional material facts and corrections will be set out in the respective arguments which follow.

ARGUMENT

THE COURT OF APPEALS OF KENTUCKY CORRECTLY DECIDED, BASED ON KENTUCKY LAW, THAT THE CLOSING ARGUMENTS OF THE COMMONWEALTH'S ATTORNEY WERE NEITHER ERRONEOUS NOR PREJUDICIAL.

The petitioner herein contends that the closing argument by the Commonwealth's Attorney was so inflammatory that it violated the applicable decisions of this Court. This incorrect assertion is primarily based upon the case of *Berger* v. *United States,* 295 U.S. 78, 55 S.Ct. 629, 79 L.ed 1314 (1935).

The Kentucky Court of Appeals, in reviewing the closing argument of the Commonwealth Attorney, concluded that:

> ". . . the closing arguments by the Commonwealth were within the bounds previously permitted by this court."

It is evident therefore that the Kentucky Court based its decision upon adequate state grounds. As was stated in *Lynch* v. *New York ex rel Pierson,* 293 U.S. 52, 54, 79 L.ed 191, 55 S.Ct. 16 (1934):

> "Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of the two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this court will not take jurisdiction."

The cases cited by petitioner are distinguishable by the fact that they are appeals from lower federal courts and as such would come under the inherent supervisory power of this Court to regulate proceedings therein under Article III, § 1 of the United States Constitution.

The petitioner claims that jurisdiction should be extended in this case due to the fact that there may be a conflict between the circuit courts of appeal and various state courts. It has been consistently held, however, that unless the procedure rises to the level of being a violation of the defendant's constitutional rights, then this Court has no inherent rule-making power over the state courts. As was stated in *Spencer* v. *Texas*, 385 U.S. 554, 17 L.ed2d 606, 87 S.Ct. 648 (1967):

> "Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial . . . But it has never been thought that such cases establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure. And none of the specific provisions of the Constitution ordains this Court with such authority. In the face of the legitimate state purpose and the long-standing and widespread use that attend the procedure under attack here, we find it impossible to say that because of the possibility of some collateral prejudice the Texas procedure is rendered unconstitutional under the Due Process Clause as it has been interpreted and applied in our past cases. As Mr. Justice Cardozo had occasion to remark, a state rule of law 'does not run foul of the Fourteenth Amendment because another method may seem to

our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar.' . . ."

The judgment below was affirmed upon the basis of existing state law which allowed considerable latitutude in the closing arguments of Commonwealth Attorneys. This argument was not so inflammatory that this Court can say that it violated petitioner's constitutional rights.

CONCLUSION

The petitioner has failed to properly meet the jurisdictional requirements or to present a substantial federal question necessary for the consideration of this Court. For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

ED W. HANCOCK
ATTORNEY GENERAL

G. EDWARD JAMES
ASSISTANT ATTORNEY GENERAL
Capitol Building
Frankfort, Kentucky 40601

COUNSEL FOR RESPONDENT